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No. 92-313

IN THE

Supreme Court of the United States

October Term, 1992

ARTHUR HOFFER, et al.,

Petitioners,

v.

CLASS PLAINTIFFS, et al.,

Respondents,

v.

CITY OF SEATTLE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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I.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION IS FUNDAMENTALLY INCONSISTENT WITH BASIC PRINCIPLES OF CLASS REPRESENTATION

A. The Ninth Circuit's Decision Renders Class Certification A Meaningless Act

The very arguments advanced by Respondents in attempting to justify the decision below and convince this Court that the issues raised by Petitioners are not worthy of Supreme Court review, actually highlight the reasons why the Petition should be granted.[1]

The crux of Respondents' opposition is that the state court's certification order authorizing different class representatives to represent the class with respect to distinct claims against a different defendant was not a judicially significant act and, indeed *was illusory*. According to Respondents, the Federal Class Plaintiffs had authority to enter an order releasing the State from the claims pending against it in a certified state court class action.[2] Respondents' arguments clash both with fundamental principles of class action representation and the Federal Class Plaintiffs' own practice throughout *MDL 551*. Each time the Federal Class Plaintiffs sought to expand their representation of the class in *MDL*

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1 Defined terms are used in the same manner in this Reply Brief as in the Petition.

2 The *Hoffer* class was certified with respect to the class's claims against the State, including two post-termination sub-classes prior to any certification of any state law or post-termination claims in *MDL 551*.

551 -- as to class, parties or time periods -- they applied to the District Court to amend the federal certification order, except in the case of the State.[3]

Respondents seek to sidestep this pivotal issue by positing that the only relevant issue is whether the classes consist of the same members. To them, it is irrelevant that different class representatives were *certified* by a different court to represent the class with respect to distinct claims against a person whom the federal class representatives never sought to name as a defendant in the federal class action, much less seek to certify any claims against.[4]

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3 Most recently, when the Federal Class Plaintiffs sought to assert claims against Ernst & Whinney ("E&W"), they filed a complaint and sought class certification of such claims. To include E&W in the settlement in *MDL 551*, they then moved to consolidate that action with *MDL 551*. Moreover, the Federal Class Plaintiffs themselves recognized that members of the E&W class (whose members are identical to the class in *MDL 551*), had to be given the opportunity to opt out of the E&W settlement, but could still participate in the balance of the *MDL 551* settlements. (A 156). However, they did not follow this approach as to the *Hoffer* class, notwithstanding that when class certification was granted in *MDL 551* and due process required that class members be given the opportunity to opt out, no indication whatsoever was given that their claims against the State were in any way implicated by, much less were included in *MDL 551*.

4 Respondents' position is also at odds with general principles of agency. If a principal retains an agent to represent him in negotiations with Corporation A, such retention would not provide him with authority to enter into a contract with Corporation B on the grounds that he is representing the same principal. This is particularly true if the principal had retained a different agent to represent him in his negotiations with Corporation B.

Central to Respondents' position is that the Hoffer Class Plaintiffs failed to opt out of the *MDL 551* class. (Resps. Br. at 4, 8). However, this fact undermines rather than supports Respondents' position. By failing to opt out of the *MDL 551* class, the Hoffer Class Plaintiffs lost their right to individually litigate or settle the claims asserted and certified by the District Court in *MDL 551*. Likewise, by failing to opt out of the *Hoffer* class, the Federal Class Plaintiffs lost their right to individually litigate or settle claims against the State. It would be irrational if having lost that right, the Federal Class Plaintiffs nevertheless could settle the *class's* claims against the State.[5]

In seeking to support the result reached below and argue that this Court should not exercise its discretionary jurisdiction in this case, Respondents also take blatantly inconsistent positions. Thus, Respondents opine, without citing any support for their bald assertion, that it is "not uncommon" for releases to be granted to non-parties in class actions. (Resps. Br. at 13). However, at the same time, they argue that the issues raised by the Petition are "arcane" and "unique to this case". Respondents further admit the significance of this issue when they state that it is important for class representatives to be able to settle with and grant releases to non-parties in a class action and that to rule otherwise "would seriously undermine the ability to settle class actions by using all potential sources of recovery." (Resps. Br. at 9). Respondents' contentions only serve to underscore the importance of the issues

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5 Notwithstanding their pejorative characterization of *Hoffer*, Respondents admit that the Ninth Circuit's decision below authorizes the class representatives in any state court class action to settle claims asserted against defendants in a federal class action, even though they are not parties to the state court action.

at hand and the danger of the approach advocated and practiced by Respondents.[6]

If Respondents' position -- which was accepted by the Ninth Circuit -- is not overturned by this Court, then the federal class representatives in any major antitrust, securities fraud, mass tort-disaster or other complex class action involving a large number of culpable parties, would have unfettered authority to settle the class's claims against all non-parties whom they never sued, solely in order to reach what they consider an acceptable figure for the settlement of the claims they asserted against the defendants in their action. The only limitation on such authority, unless the Decision below is reversed, is that the class consist of the same members. Not only is such an approach at odds with

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6 It is ludicrous to claim as a general proposition that it is necessary to settle a claim in "one proceeding" where the class representatives in that action never saw fit to include any claims against that person in the class certification order. Moreover, if the Federal Class Plaintiffs in the present case saw the class certification order in *Hoffer* as posing any impediment to their effective representation of the class in *MDL 551*, they could have moved to decertify the *Hoffer* class before the state court. They never did so. Furthermore, the State could have negotiated with the authorized class representatives for the class in *Hoffer* to settle the claims asserted against it in order to arrive at a so-called "global settlement". The Hoffer Class Plaintiffs were willing to hold such settlement discussions; the State was not. Instead, the State chose to effect a back-door settlement of such claims through its ally, the WPUG defendants after an unfavorable decision was rendered against it in state court in order to pay less money to the class. By contrast, the City of Seattle, a smaller and less culpable defendant, paid $50,000,000 in settlement. (A93). Similarly, the Bonneville Power Administration, against whom all claims in *MDL 551* had been dismissed with prejudice, paid $35,000,000. (A132).

basic principles of class representation, the dangers of collusion and prejudice to the class are highly alarming.[7]

While Respondents seek to limit that case to their rendition of its facts, the Second Circuit's decision in *National Super Spuds Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981) articulated a workable *standard* for the scope of authority of federal class representatives, a standard which was rejected by the Ninth Circuit. Respondents' attempts to distinguish that case do not change the fact that the Second Circuit in *Super Spuds* specifically found that: (i) federal class plaintiffs are only authorized to represent members of the class with respect to claims within the scope of the certification order and (ii) that if a judgment after trial could not extinguish claims not asserted in the class action complaint, the class representatives lack authority to settle such claims.

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7 Respondents also appear to rely on the fact that class members were advised in the notice of settlements that their claims against the State were to be extinguished under the *MDL 551* settlements. They fail to mention, however, that this cursory notification was buried in fine print in a footnote in a lengthy document. Moreover, the class was never informed in such notice that they could accept the settlements against the *MDL 551* defendants and continue to proceed with their claims against the State in state court (*i.e.*, they were never afforded the right to opt out of the $10 million State Settlement). We submit that if class members had been given this option, they would have voted to opt out of the $10 million State Settlement, given the more than $2 billion shortfall in damages to the class that remained after all *MDL 551* settlements. The failure to permit class members to opt out of the State Settlement or, at least all *MDL 551* settlements, was improper and, indeed, did not comport with due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

B. Respondents Have Failed To Provide Any Support Whatsoever For Their Claim That A Settlement Of A Class Action May Release Non-Parties

While Respondents assert that "it is not uncommon for a settlement to release parties that are not actually before the court" (Resps. Br. at 13), they, like the Court of Appeals and District Court below, fail to provide any support whatsoever for their contention that the settlement of a class action may include claims against a non-party. Indeed, they fail to provide any support for the narrower proposition on which they rely to buttress their position, *i.e.*, that "corporate defendants in class actions routinely insist that settlements also release all potential claims the class may have against the defendants' corporate affiliates (*e.g.*, parent company or subsidiaries) or their directors, officers and employees, even though they are not defendants." (Resps. Br. at 13). *Contra Herbst v. International Tel. & Tel. Corp.*, 72 F.R.D. 85 (D. Conn. 1976) (district court rejected a settlement of class action which it found otherwise fair and reasonable because it provided for releases which would prevent plaintiffs in pending derivative actions from seeking contribution from corporate directors).

Moreover, even if Respondents were correct as to this limited proposition, this would not change the result here since factually identical claims against agents or affiliates of a corporate defendant would be barred under principles of *res judicata* since they are privies of the corporate defendant. *E.g.*, *Amalgamated Sugar Co. v. NL Indus.*, 825 F.2d 634, 640 (2d Cir. 1987), *cert. denied*, 484 U.S. 992 (1987) (corporation-shareholders); *Raitport v. Commercial Banks Located Within This Dist. As A Class*, 391 F. Supp. 584 (S.D.N.Y. 1975) (parent-subsidiary). Here, the class has asserted independent claims against the State, which is

not an agent or affiliate of any defendant in *MDL 551*. A judgment in *MDL 551* would have no *res judicata* effect in *Hoffer*.

In strikingly disingenuous fashion, Respondents seek to support their argument that the State's non-party status is not significant solely by reference to cases which involved settlement of claims against *party defendants* to the class action. Thus, Respondents -- like the Court of Appeals and District Court below -- incorrectly rely on *dicta* in *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) to support the result reached in the present case.

In *TBK Partners*, and all other cases relied on by Respondents, the parties to the settlement were *defendants* in the action. In *TBK*, the court found that it could settle the class's *appraisal remedy* arising out of the same facts as the damage claims asserted against *the defendant* in the federal action. Accordingly, *TBK Partners* provides no support whatsoever for the proposition that a federal court has authority to approve a settlement and enter an order releasing claims against a person not a party to that action and over whom the court lacks jurisdiction.[8]

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8 All of the other cases relied on by Respondents are to the same effect. *See*, Petition at 16-17; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982) (factually identical state law antitrust claims brought by individual class members against *the defendant* to the federal class action could be settled); *Oswald v. McGarr*, 620 F.2d 1190, 1198 (7th Cir. 1980) (settlement with a defendant in a class action may include claims arising out of same facts against *that defendant* even though they were not asserted in the class action complaint).

Respondents also cite *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398 (D. Minn. 1987), as support for their assertion that they

II.

RESPONDENTS' ARGUMENTS WITH RESPECT TO COMITY AND THE ANTI-INJUNCTION ACT ARE TOTALLY UNAVAILING

Respondents have said nothing which alters the inescapable conclusion that the Ninth Circuit's decision is a frontal assault on comity which, if not reversed by this Court, will provide a broad-based mandate for the federal courts to interfere with the jurisdiction of state courts.[9] No amount of legal alchemy by Respondents can camouflage what actually occurred here: the entry of a federal order and judgment which "conclusively releases" a non-party to the federal action (over whom the federal court lacked jurisdiction)[10] from claims being litigated against it in a certified class

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were authorized to settle *Hoffer*. *Holden* is completely inapposite since that case merely stands for the proposition that where there are numerous class plaintiffs in a federal class action, the fact that all federal class plaintiffs do not support settlement of the claims asserted against *the defendants in the action* does not in and of itself render such settlement infirm. The present case involves settlement of the class's claims against the State, a non-party, which are pending in a separate certified state court class action over the objection of *all* of the certified class representatives with respect to the claims settled.

9 While Respondents state that the District Court merely approved a settlement that included the State, they omit that it also entered an order and judgment approving such settlement and releasing the State from the claims asserted against it in *Hoffer*.

10 Nothing said by Respondents alters the Petitioners' showing that the District Court lacked jurisdiction to enter an order releasing the State under the Eleventh Amendment and otherwise. Respondents also argue that assuming the State had waived its immunity to suit in federal court, the class could have asserted a claim against it under Section 10(b) of

action pending in state court. Suffice it to add here that if Respondents were correct, then there simply was no point in *Hoffer* being maintained and certified as a class action in the first place, since the disposition of that action was at all times totally within the control of the Federal Class Plaintiffs, the defendants in *MDL 551* and the State, and the views of the authorized class representatives in *Hoffer* and the state court presiding over it are of no moment.

Respondents also rely on distinctions without any meaningful differences in arguing that principles of comity were not trampled on here. For instance, various federal courts have found that the issuance of a mandatory class certification order may violate principles of comity where the practical effect of the order would be to bar the continued prosecution by class members of pending, individual state court actions. *E.g.*, *In re Temple*, 851 F.2d 1269 (11th Cir. 1988).

While stating that such cases involve a "different procedural posture," Respondents do not and can not explain why such an order -- which does not adjudicate the state court claims on the merits -- violates principles of comity, but a federal order "conclusively releasing" a non-party from the claims asserted against it as party defendant in a certified state court class action does not.

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the Securities Exchange Act of 1934. (Resps. Br. at 16-17). In addition to being incorrect, this point is a red herring. Since no federal claim *had* been asserted against the State at the time the District Court entered an order and judgment releasing it from the claims asserted against it in *Hoffer*, the fact that Respondents now believe a claim *could* have been asserted against it cannot provide the jurisdictional predicate necessary to support the District Court's entry of its order and judgment. Moreover, the statute of limitations to assert such a claim had expired by the time the District Court entered its order and judgment.

Finally in arguing that the re-litigation exception to the Anti-Injunction Act justified the District Court's order releasing the State from the claims asserted against in *Hoffer*, Respondents continue to engage in circular reasoning. Thus, Respondents state that the Ninth Circuit's decision "does not provide authority for interference with litigation; it simply recognizes *the parties'* rights to settle their claims, rather than continuing to litigate them." (Resps. Br. at 20) (emphasis added). Respondents' argument suffers from the very same flaw as the Ninth Circuit's decision: the State was not a party defendant in *MDL 551*.

All of the Anti-Injunction Act cases cited by Respondents involve *re*-litigation of claims which had been asserted against a defendant (and finally resolved) in the first action. *See Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir. 1986) (after claim asserted against defendant in federal action had been dismissed with prejudice, the plaintiffs in that action asserting the same claims against *the same defendant* in state court); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1325-26 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982) (injunction preventing class members in federal class action from individually bringing state antitrust claims involving identical facts against *the defendant* in the federal class action was permissible under the re-litigation exception; the Fifth Circuit found that such an injunction would not be permissible if the judgment in the federal action would not have barred litigation of the new claim under principles of *res judicata*); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328 (2d Cir. 1985) (involved the All Writs Act, not the Anti-Injunction Act; federal district court could enjoin state attorney generals from maintaining lawsuit involving factually identical claims against the defendants in the federal class action).

CONCLUSION

For the reasons set forth above, as well those set forth in the Petition, this Court should grant the Petition For Certiorari.

Respectfully submitted,

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